STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

AMADEUS EUGENE GLENN,

Defendant-Appellant.

UNPUBLISHED
December 14, 2006

No. 260500
LC No. 04-001633-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANTHONY DOUGLAS WORTH,

Defendant-Appellant.

No. 260501
LC No. 04-001635-FC

Before: Sawyer, P.J., and Wilder and Servitto, JJ.

PER CURIAM.

Defendants Amadeus Glenn (Glenn) and Anthony Worth (Worth) were each convicted of armed robbery MCL 750.529, and conspiracy to commit armed robbery, MCL 750.157a, at a joint trial. The trial court sentenced defendants to concurrent prison terms of 10 to 20 years for each conviction. Defendants appeal as of right. This Court consolidated their appeals.

I.

Defendants' convictions arise from the robbery of a convenience store and gas station attached to the Pair-A-Dice Inn in Christmas, Michigan on March 29, 2004, at approximately 4:30 a.m. An alleged coconspirator, John Zardus, took $345 after threatening to shoot a store clerk with a BB handgun. By the time of trial, Zardus had pleaded guilty to the robbery. Before Zardus entered the store, defendants entered the store, where they stayed for approximately five minutes, and Worth purchased a soft drink. Later Zardus entered the store and committed the robbery. The prosecutor's theory of the case was that defendants assisted Zardus by helping him

steal the BB gun from a nearby Wal-Mart, drove Zardus to the convenience store, entered the store first to "check it out," and assisted Zardus after he took the money.

Glenn argues that (1) he is entitled to dismissal of the charges or a new trial because the prosecutor failed to disclose evidence affecting the credibility of a witness, violating Glenn's rights to due process and confrontation; (2) prosecutorial misconduct deprived Glenn of his right to a fair trial; (3) he was deprived of due process because the jury was given a vague and incomplete instruction, or alternatively, that his counsel was ineffective for failing to request instructions on all elements of the charges; (4) the prosecution presented insufficient evidence to support the convictions on both charges; (5) he is entitled to resentencing because the state and federal due process clauses prohibit scoring points under offense variable 13 for a juvenile matter; and (6) he is entitled to a new trial because his counsel was ineffective for failing to object to prosecutorial misconduct. Similarly, Worth argues that (1) his convictions should be overturned because there was insufficient evidence; (2) the trial court denied him a fair trial by various instructional errors and the denial of his motions for a directed verdict and for a new trial; (3) the prosecutor's actions denied him due process and a fair trial under the Michigan and federal constitutions; and (4) he received ineffective assistance of counsel. We discuss each argument in turn, combining defendants' arguments regarding prosecutor misconduct, sufficiency of the evidence, and effective assistance of counsel.

II.

A.

First, Glenn argues that he is entitled to dismissal of the charges or a new trial because the prosecution failed to disclose evidence. A claim of prosecutorial misconduct based on a failure to disclose evidence is reviewed de novo. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). This Court considers the alleged misconduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999).

B.

Due process requires disclosure of evidence in the prosecutor's possession which is exculpatory and material. *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998). "Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence 'may make the difference between conviction and acquittal.'" *Id.* at 281, quoting *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985). In order to establish a *Brady* violation, a defendant must prove that: (1) the state possessed evidence favorable to the defendant; (2) he neither possessed the evidence nor could have obtained it himself with any reasonable diligence; (3) the prosecution suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Lester, supra* at 281-282.

In the instant case, Glenn challenges the prosecutor's failure to disclose witness David Johnson's[1] plea negotiations with the prosecutor. Johnson was charged with being as a fourth-habitual offender and with arson. After Johnson testified, the trial court conducted contempt proceedings because of Johnson's initial refusal to testify. Johnson, who had posted bond, had been arrested on a material witness warrant to secure his testimony. During the proceeding, the court discussed a letter written by Johnson's attorney to the prosecutor offering Johnson's testimony in exchange for a complete dismissal of the charges against him. Apparently, this was the first time Glenn and Worth's counsel learned of any plea negotiations between Johnson and the prosecution. In their motions for a new trial, Glenn and Worth argued that the prosecutor should have disclosed a plea offer that was made to Johnson in his arson case before Glenn and Worth's trial. Glenn and Worth also argued that the prosecutor should have revealed the letter from Johnson's attorney offering his testimony in exchange for the dismissal of the arson case.

Johnson's written statement was made on August 26, 2004. Around September 17, 2004, the prosecutor made Johnson an amended plea offer. Johnson could plead guilty and essentially be sentenced to time served.[2] The prosecutor stated that the offer was an attempt to save the expense of having to provide expert witness fees for Johnson. Johnson later rejected this offer and hired new attorneys, one of whom then made the subsequent request to the prosecutor on October 12, 2004. The prosecutor maintained that she ignored Johnson's letter offering his testimony in return for dismissal of the charges because it was an "outrageous" suggestion. Johnson eventually went to trial and was convicted.

At the hearings on defendants' separate motions for a new trial, retired Alger County Sheriff Deputy David Bowerman, who took Johnson's statement, testified that he approached Johnson in the jail and asked if he had heard anything about the armed robbery case. Johnson told Bowerman that Glenn and Worth had talked about the case, but that he, Johnson, was unwilling to testify. A month later, Bowerman again approached Johnson, who indicated that he wanted to cooperate. Bowerman told Johnson that he would not receive anything for his cooperation. Johnson stated that he still wished to testify because he did not like defendants because they had fought with him.

At Worth's hearing, his counsel conceded that there was no evidence that any plea offer involving testimony was ever made to Johnson. He also claimed that Johnson's trial testimony did not appear credible.

MCR 6.201(B)(5) requires the prosecutor to disclose upon request "any plea agreement, grant of immunity, or other agreement for testimony in connection with the case." Here, Johnson did not enter into an agreement with the prosecutor. However, defendants rely on *People v*

[1] Johnson, an inmate who shared a cell with defendants, testified at trial to statements he overheard defendants make about the robbery. Johnson also provided a written statement that was used at trial against Glenn and Worth, indicating that defendants "sent" Zardus into the store.

[2] The prosecutor had already offered to drop the habitual offender charge in exchange for a guilty plea.

Atkins, 397 Mich 163, 173; 243 NW2d 292 (1976), to argue that the prosecutor nevertheless had a duty to disclose its initial rejected offer to Johnson, and Johnson's later offer to the prosecutor. In *Atkins*, which dealt with the testimony of a co-conspirator, the Court held that reasonable expectations of leniency should be disclosed to the defense:

> Where an accomplice or co-conspirator has been granted immunity or other leniency to secure his testimony, it is incumbent upon the prosecutor and the trial judge, if the fact comes to the court's attention, to disclose such fact to the jury upon request of defense counsel. The same requirement of disclosure should also be applicable if reasonable expectations, as opposed to promises, of leniency or other rewards for testifying resulted from contact with the prosecutor. [*Id.* at 173 (footnote omitted).]

However, the instant case does not involve the testimony of a co-conspirator or accomplice. Thus, *Atkins* is not applicable. Moreover, even if *Atkins* were applicable, defendants have not shown that Johnson had a "reasonable expectation" that he would receive leniency in exchange for testifying against defendants. The statements and evidence surrounding the prosecutor's plea offer support the prosecutor's contention that it was given solely to save the cost of expert witness fees. None of the evidence presented by defendants revealed that Johnson's decision to talk about what he had heard was due to anything other than personal animosity toward defendants. Additionally, while Johnson made a separate offer to the prosecutor, this occurred after he provided his written statement about defendants' inculpatory admissions and after he had been told that he would receive nothing in return for his cooperation. The prosecutor ignored Johnson's later attempt to obtain a dismissal of the charges against him.

Under the circumstances, defendants have failed to provide any evidence of a *quid pro quo* arrangement, or shown that one was reasonably expected by Johnson. Therefore, the prosecutor did not improperly withhold exculpatory evidence. *Lester*, *supra* at 281-282.

III.

A.

Next, both defendants argue that the prosecution committed misconduct, depriving them of their constitutional right to a fair trial and/or due process. Defendants concede that there were no objections to the claimed instances of prosecutorial misconduct at trial. Thus, these claims of error are not preserved. *People v McLaughlin*, 258 Mich App 635, 644-646; 672 NW2d 860 (2003). Regarding the prosecutor's allegedly improper arguments at sentencing, however, Worth's counsel argued that defendant should not be punished for exercising his right to stand trial. Therefore, this issue is preserved by Worth.

Claims of prosecutorial misconduct are generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). However, because Glenn failed to preserve any objection to prosecutorial misconduct, and Worth failed to preserve all but one such claim, this Court reviews them for plain error affecting defendants' substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). To avoid forfeiture, defendants must establish (1) misconduct by the prosecutor; (2) that the misconduct was plain (i.e., clear or obvious); and

(3) prejudice or that the misconduct was outcome determinative. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Moreover, even if plain misconduct is found, reversal is required only when the misconduct resulted in the conviction of an actually innocent defendant or when the misconduct seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of the defendant's innocence. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). If a curative instruction could have alleviated any prejudicial effect, this Court will not find error requiring reversal. *Ackerman*, *supra* at 448-449.

B.

1. Allegedly improper analogies

Defendants argue that the prosecutor improperly compared them to murderers in an attempt to inflame the jury. During closing argument, the prosecutor presented the following analogy:

> So the defense presented during this trial is a rather technical legal one. In effect, the defendants are saying, oh, we're guilty, but it's just of a different charge. If only the prosecutor had charged us with being accessories after the fact.
>
> And that's not really an unfamiliar argument. I'll run through some other examples. A woman secretly gives birth to a live infant, seals it in a garbage bag where it expires, and leaves the bag in a public place, and then says: If only the prosecutor had charged me with improperly disposing of human remains.
>
> A man who imagines - - imagines himself to be in a love triangle, follows two co-workers home, shoots them both in their front yard, and then says: If only the prosecutor had charged me with reckless use of a firearm, hey, I'd be all over that. I'd plead guilty to that.
>
> My point is that these charges, like accessory after the fact, they do fit some of the facts, but they don't begin to address what really happened. In fact, they're insulting to the victim.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The propriety of a prosecutor's comments depends on the facts of the particular case. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). This Court reviews the pertinent part of the record and examines the prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *Id.* "A prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice." *People v Lee (After Remand)*, 212 Mich App 228, 247; 537 NW2d 233 (1995), citing *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). However, a prosecutor may argue the evidence and all reasonable inferences arising from the evidence that relate to the theory of the case, and need not state arguments in the blandest possible terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Moreover, "the prosecutor's comments must be considered in light of defense counsel's

arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Thus, a comment that might otherwise be improper "may not rise to an error requiring reversal when the prosecutor is responding to defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Although the prosecutor's analogy was vivid and in questionable taste, it was designed (a) to show that defendants were not simply accessories after the fact, (b) to refute defense counsels' contrary arguments, and (c) to point out logical deficiencies in the defense theory. This was a proper justification for the use of the analogy. Under the circumstances, defendants have not shown that the prosecutor's comments were clearly improper.

2. Alleged civic-duty argument.

Defendants argue that the prosecutor improperly appealed to the jurors' sense of civic duty during closing arguments when she maintained that a guilty verdict was the only "fair" one for the victim and the only "just" one for Zardus (because he would otherwise be the only person serving prison time for a crime that defendants also committed). We disagree. A prosecutor may not argue that the jury must convict as part of its civic duty, because such arguments inject issues broader than the guilt or innocence of the accused, and play on the fears and prejudices of the jury. *Bahoda, supra* at 284-285. Here, however, the prosecutor expressly linked her statements that asked the to jury find defendants guilty because such a verdict was fair and correct "to the facts and the law." The prosecutor was asking the jury to convict on the basis of evidence produced at trial. "Because the prosecution argued that the crime had been established beyond a reasonable doubt, these remarks do not constitute an assertion of personal belief by the prosecutor in defendant's guilt or an argument that the jury should convict the defendant regardless of the evidence." *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). Thus, defendants have not established plain error on the basis of a "civic duty" claim. *Id*.

3. Alleged vouching for witnesses and injecting personal beliefs

Defendant Glenn argues that the prosecutor improperly vouched for the testimony of Alger County Sheriff Sergeant Anthony Grahovac when, while describing his inadvertent erasure of a portion of the store's videotape, she stated that he was "devastated" by the erasure. A prosecutor may not vouch for the credibility of a witness by expressing a personal opinion about the witness's truthfulness or by implying that she has some special knowledge of that truthfulness. *Thomas, supra* at 455.

The prosecutor's statement was made in response to the defense's implication that the erasure (of the portion of the tape where defendants left the store and allegedly signaled to Zardus that the coast was clear), was "a violation of fair play" and prejudiced the defendants' ability to defend the charges. The prosecutor did not ask the jury to convict defendants based on special knowledge. Grahovac did testify that his erasure of the tape was accidental. The prosecutor's comment attempted to address the testimony and rebut the insinuation raised by defendants. This comment was not improper.

Defendant Glenn also maintains that the prosecutor improperly vouched for the credibility of police witnesses by maintaining that they "faithfully" reported defendants' statements. We disagree. The prosecutor was attempting to rebut defendants' arguments that the

police fabricated the statements and "spoon fed" the facts to defendant Worth who was trying to cooperate so that he would receive favorable treatment.

4. Alleged denigration of defense counsel and introduction of counsel's advice to defendants

On cross-examination, the prosecutor asked defendant Worth whether, after he obtained an attorney, "[W]as the difference between aiding and abetting and accessory after the fact explained to you?" Both Glenn and Worth now argue that this questioning was improper because any advice from counsel was privileged. Defendant Glenn also argues that the prosecutor improperly denigrated defense counsel during closing argument when she suggested that defendants and Zardus came up with their story in jail after having access to counsel:

> You've heard that all three defendants have since their arrest had access to their lawyers, to all the police reports, to the testimony presented at the preliminary examination, and to all the time in the world to fix their mistake, to come up with a story that would fit the known facts.

Defendants argue that this argument implied that their attorneys told them to lie.

A prosecutor does not commit misconduct by making a good-faith effort to admit evidence, even where the evidence is of marginal relevance. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). We disagree with defendants' arguments that the prosecutor improperly sought to compel defendants to disclose privileged communications with their attorneys. Instead, the question posed by the prosecutor was substantively geared toward eliciting whether defendant Worth, and also defendant Glenn, knew the difference between guilt as an aider and abettor, and as an accessory after the fact, and had a chance to discuss it among themselves and with Zardus. This questioning and argument were relevant to the prosecutor's contention that Worth and Zardus were intentionally fabricating portions of their testimony to admit conduct that only fit the elements of accessory after the fact, an uncharged crime. The prosecutor did not commit misconduct. *Id*.

Defendant Glenn's related challenge to the prosecutor's closing argument is similarly without merit. "A prosecutor cannot personally attack the defendant's trial attorney because this type of attack can infringe upon the defendant's presumption of innocence." *Kennebrew*, *supra* at 607. Here, however, the statement that defendants and Zardus had ample opportunity to speak with each other in jail and to conform their testimony to the known facts was not a personal attack on defense counsel. It was instead a fair comment on defendant Worth's opportunity to fabricate portions of his testimony and the fact that his admissions to the police were more inculpatory than his trial testimony. It is not improper for the prosecutor to argue that a defendant had the opportunity to fabricate. *People v Buckley*, 424 Mich 1, 15; 378 NW2d 432 (1985). Glenn has not shown plain error.

5. Alleged improper questioning of jurors

Defendant Worth argues that the prosecutor improperly asked some prospective jurors who were Michigan Department of Corrections (MDOC) employees whether most convicts believe they were wrongly convicted. He maintains that the questioning was designed to elicit a

disbelief in defendant's statements on the basis that he, like other convicts, is a liar who will not admit his guilt.

During voir dire, defense counsel told the trial court that he was concerned that the jury pool consisted of a large number of MDOC employees. The questions at issue were designed to discover whether the jurors could view defendants differently than those who had been convicted, and to base their decisions of guilt or innocence on the facts presented. Defendant has not shown that the prosecutor acted improperly.

6. Alleged denigration of defendants

Both defendants raise similar claims that the prosecutor improperly denigrated them by attempting to prejudice the jury against them. These claims fall within three general categories. First, defendants maintain that the prosecutor injected irrelevant evidence about defendants' and Zardus's living arrangements, employment history, and socioeconomic status. Second, defendants maintain that the prosecutor improperly attacked their intelligence, education, and morals during closing argument. Third, defendants complain that the prosecutor improperly introduced evidence that Amber McGuire[3] had been fired from Wal-Mart for stealing, and that a police officer was familiar with defendants from previous encounters.

a. Evidence of defendants' and Zardus's personal information

Defendants argue that the prosecutor improperly introduced evidence of their and Zardus's employment status and living arrangements, and the fact that none of them owned a car. They maintain that this information was irrelevant and prejudiced the jury against persons of defendants' poor economic and social status. They also maintain that the jury could have improperly used the fact that they were poor to conclude that they participated in the robbery.

The evidence of defendants' and Zardus's living arrangements was relevant to show the connections between them. Defendants were charged with aiding and abetting Zardus in the robbery, and with conspiracy. Glenn was living with McGuire on the night of the robbery and, at that time, Worth and Zardus also stayed there. Zardus testified that he was living with Glenn at the time of the robbery. Worth told the police that Zardus wanted to commit the robbery because he was tired of living with friends and having no money, thereby injecting his financial status as a motive for the robbery. In this conspiracy case, the prosecutor made a good-faith effort to introduce evidence linking defendants to each other and to Zardus.

Likewise, the evidence that Zardus did not own a car and that Worth and Glenn also did not own cars or have driver's licenses was also relevant. This evidence, as well as the evidence linking McGuire to Glenn as his girlfriend, supported McGuire's testimony that she drove the others around and sometimes loaned them her car because she was the only one in the group who

[3] Worth initially gave Sergeant Grahovac the alibi that he, Worth, Glenn and a third man (D.J. Chapman) were driving downstate to Flint in Amber McGuire's car at the time the robbery occurred. McGuire owned the car defendants were driving at the time of the conspiracy and robbery.

had a car. This in turn linked the group to the car used in the robbery, as well as to testimony by officers who had seen defendants and McGuire together near the Wal-Mart. The introduction of this relevant evidence was not misconduct on the part of the prosecutor.

Defendants also complain about the introduction of their employment status. Glenn did not work at the time of the robbery and Worth was employed as a dishwasher. They maintain that questions about their employment status were improper because poverty or unemployment is generally not admissible to show a motive to steal. See *People v Henderson*, 408 Mich 56, 66; 289 NW2d 376 (1980).

The prosecutor first elicited this testimony in response to defense counsel's cross-examination of McGuire. Earlier on the night of the robbery, defendants, Zardus, and McGuire went to a gas station. Glenn's attorney asked McGuire whether defendants had any money with them. On redirect examination, the prosecutor asked McGuire about defendants' sources of funds. Given that the prosecutor's question was a direct response to defense counsel's questions, defendants have not shown that the prosecutor's questioning was plainly improper. See *People v Smith*, 80 Mich App 106, 114-117; 263 NW2d 306 (1977).

Zardus's employment status was relevant. Zardus told Worth that he intended to rob the store because he was broke and tired of having to live with friends. The accuracy of this information was relevant to establishing whether Worth and Glenn believed that Zardus intended to rob the store. This was directly at issue in determining whether defendants were guilty as aiders and abettors.

In any event, the prosecutor did not argue that defendants had a motive to participate in the robbery because of their financial status. None of her arguments about defendants directly touched upon their employment status. The prosecutor's comments merely contain references, albeit ambiguous ones, to defendants' "peer group" activities and beliefs. Considered in context, the remarks were not clearly intended as a reference to defendants' economic status, but rather that defendants' actions could be explained by the fact that they had a criminal mindset. Defendants have not shown plain error.

b. Amber McGuire's theft and previous police interaction with defendants

Defendants argue that the prosecutor impermissibly elicited testimony from a Wal-Mart associate that McGuire had been fired from her position for stealing cigarettes. This evidence was relevant. Defendants admitted to the police that they assisted Zardus in taking a BB gun from the store. Michigan State Police Trooper Dale Hiller[4] knew that McGuire worked in the

[4] Trooper Hiller testified that he spoke with defendants and later with Grahovac, and that he knew that Glenn's girlfriend, McGuire, owned a black 1993 Crown Victoria (the same kind of vehicle used in the robbery). Hiller testified that he knew defendants and McGuire through investigating other incidents in Marquette County where the three were suspects. Hiller also testified that on the morning in question he noticed McGuire's care make an illegal left turn leaving the Wal-Mart parking lot between 12:30 and 12:50 a.m. He could not identify the driver but saw a person matching Glenn's description in the front passenger's seat and at least one other person in the back seat.

store as a cashier. McGuire owned the car that defendants were driving. Sergeant Grahovac, who viewed the Wal-Mart security tape with the loss-prevention associate, testified that he initially thought that McGuire was with defendants in the store on the evening of the robbery, although it was actually Zardus. The loss prevention associate testified that the police asked him about McGuire's employment status. Wal-Mart employees were also questioned about the positions of the security cameras in the store, and particularly about the lack of a camera in the area where the gun was taken. The questioning was probative of whether McGuire could be linked to the theft of the BB gun, at least as someone who provided information to the defendants and Zardus. McGuire could have developed some animosity toward the store after having been discharged. Under the circumstances, we cannot say that the prosecutor clearly committed misconduct by proffering this evidence.

The testimony concerning defendants' and McGuire's prior interactions with the police was likewise relevant. The information was elicited to show, among other things, how the police recognized defendant Glenn's distinctive clothing preferences, how the police recognized McGuire's automobile, which led them to the Wal-Mart, and the fact that defendants were cousins. These items were in turn relevant to the scope of the investigation and the identification of defendants as participants in the conspiracy and robbery. In addition, this Court has held that "the circumstances surrounding a confession, including a suspect's prior contacts with the police, [are] a pertinent factor to put before the jury in its weighing of the reliability of a defendant's statement to the police." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). Defendants have not shown plain misconduct in the prosecutor's introduction of this evidence.

In addition, as with the information concerning McGuire, any prejudicial effect could have been cured by an appropriate instruction had an objection been made. Under the circumstances, defendants have not demonstrated outcome-determinative plain error in the introduction of this evidence.

c. Closing argument commentary

Defendants present a list of allegedly improper comments during closing argument wherein the prosecutor allegedly insulted defendants' and Zardus's intelligence, accused them of lying, and accused them of having a gang mentality. They argue that the prosecutor's comments were highly prejudicial and denied them a fair trial.

"A prosecutor must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). However, the prosecutor need not choose the blandest of terms when discussing the evidence. *Aldrich*, *supra* at 112. Indeed, this Court has regarded "emotional language" in closing argument as "an important weapon in counsel's forensic arsenal." *People v Ullah*, 216 Mich App 669, 679; 550 NW2d 568 (1996), quoting *People v Mischley* 164 Mich App 478, 483; 417 NW2d 537 (1987).

Here, defendant challenges a number of the prosecutor's remarks. For example, the prosecutor stated that the witness oath was "meaningless" for people in defendants' "peer group" and that they valued self-preservation and loyalty. The prosecutor argued that there were many instances where defendants "didn't have the brain power to figure out whether their answer would help or hurt, and they are – end up being stuck with the truth." The prosecutor also argued that defendants goaded Zardus into the robbery and that he was "one of the pathetic kids

on the fringe of a bad group" who would have been regarded as a "Wimp. Coward. More likely *****" had he not robbed the store. She characterized defendants' attempts to limit their culpability as "self-serving crap" that did not pass the "fall-down laughing test." She also maintained that Zardus's decision to take the blame for the robbery would score him points with the rest of his peer group.

These remarks approach intemperance. However, viewed as a whole, they were designed to explain the prosecutor's theory of why Zardus and the others had agreed to have Zardus take the blame for the crime. They also explained why Worth's initial statements to the police were more inculpatory than his trial testimony. Further, they addressed defendants' credibility, and were also calculated to further the prosecutor's goal that the jury believe the inculpatory portions of defendants' statements and testimony while disbelieving the exculpatory portions. Considering that the latitude afforded to a prosecutor is broad, and that the purpose of the statements was not gratuitous denigration, we find that the comments were not improper.

Defendants have not demonstrated outcome-determinative error. The trial court instructed the jury that the prosecutor's arguments were not evidence, and that it was to base its decision only on the evidence presented. A jury is presumed to follow instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). To the extent this general instruction was insufficient, any prejudicial effect could have been cured by a further appropriate instruction had defendants objected. Therefore, defendants have not shown that they are entitled to appellate relief. *Ackerman, supra* at 448-449.

7. Prosecutor's comment during sentencing

Defendant Worth argues that the prosecutor improperly advocated at sentencing that the trial court sentence defendant to a lengthier prison term because he exercised his constitutional right to proceed to trial. During sentencing, defense counsel requested a lesser sentence in part because it would be "unfair" to sentence defendant to a greater term than Zardus, who received a sentence of 6 to 15 years in prison, when Zardus was the person who actually committed the robbery. When asked to comment, the prosecutor responded:

> Thank you, your Honor. Well, all I can really say is that for the reasons more fully stated at trial, and I'm sure the Court recalls, I feel that all three defendants are equally culpable in this particular crime, and that this defendant is distinguishable for sentencing on the basis of his prior record. His co-defendant did not have nearly the priors that this defendant brings to the table.
>
> He also chose to roll the dice and go to trial, and that distinguishes him as well from Mr. Zardus. So we feel the recommendation is appropriate, your Honor.

A trial judge may not sentence a defendant to a higher term because the defendant chose to exercise his constitutional right to a jury trial. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). Viewing the prosecutor's remarks in context, however, the prosecutor did not request that defendant receive a greater sentence because he did not plead guilty. Instead, she argued, however inartfully, that a comparison with Zardus was inappropriate and that defendant's sentence should be particularized to his own circumstances. The basis for her

argument rested on defendant's more extensive criminal history and the fact that Zardus had effectively received an artificially lowered sentence as a result of his plea. Contrary to defendant's argument, that one defendant may receive a lesser sentence through a guilty plea does not, by itself, punish those who choose not to waive the right to proceed to trial. *Godbold*, *supra* at 516-517.

Moreover, the trial court did not sentence defendant Worth because he elected to go to trial. It instead based its sentencing decision on the fact that defendant Worth was extensively involved in the entire plan to commit the robbery and defendant's extensive criminal history. On the facts before us, defendant has not shown that appellate relief is warranted.

8. Cumulative Error

Both defendants argue that the cumulative effect of the prosecutor's misconduct denied them a fair trial. The cumulative effect of several errors may warrant reversal where they deny the defendant a fair trial. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). However, only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Here, defendants have not established misconduct. We therefore reject defendants' claims that the cumulative effect of multiple errors requires a new trial.

IV.

A.

Glenn next argues that he was deprived of due process because the trial court gave a vague and incomplete jury instruction regarding the difference between aiding and abetting and being an accessory after the fact. Before jury selection, the trial court noted that, due to the holding in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), it would not provide an accessory after the fact instruction. Instead, to explain the distinction between accessory after the fact and the charged offense, the trial court indicated that it would accept the prosecutor's proposed instruction. Counsel for codefendant Worth questioned whether this instruction would cause confusion. He was satisfied, however, when the trial court agreed that he could tell the jury that it could not find that a finding that defendants helped Zardus only after the robbery would require them to find defendants innocent, rather than guilty of accessory after the fact. Counsel for defendant Glenn did not raise an objection.

Before the trial court instructed the jury, it asked counsel for both defendants whether they had an objection to the prosecutor's proposed jury instructions. Counsel for codefendant Worth stated that he was satisfied with the addition of the "distinction instruction," since it was to be used in conjunction with CJI2d 8.1, the instruction for aiding and abetting. Thus, as to defendant Worth, this issue is waived. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). Counsel for defendant Glenn did not object to the requested instruction. Therefore, as to defendant Glenn, this issue is not preserved. MCL 768.29; *People v Fletcher*, 260 Mich App 531, 558; 679 NW2d 127 (2004).

Unpreserved claims of improper jury instructions are reviewed for plain error. *People v Gonzalez*, 468 Mich 636, 642-643; 664 NW2d 159 (2003). To avoid forfeiture under the plain

error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain; and (3) the plain error affected substantial rights, i.e., the defendant was prejudiced (the defendant generally must show that the error affected the outcome of the lower court proceedings). *Carines*, *supra* at 763.

B.

Jury instructions are read as a whole, rather than extracted piecemeal to establish error. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Even if somewhat imperfect, jury instructions do not warrant reversal if they "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id.* The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence. *Id.*

Glenn argues that the trial court erred by refusing to instruct the jury on accessory after the fact in accordance with CJI2d 8.7, and by failing to add language to the aiding and abetting instruction advising the jury that, to find defendant guilty as an aider and abettor, it must find that he provided assistance before or during the crime. Glenn is mistaken. The court gave the standard jury instructions on aiding and abetting, CJI2d 8.1, CJI2d 8.4, and CJI2d 8.5. The jury was also specifically instructed that, in order to convict on an aiding and abetting theory, it could not find that defendants' participation occurred only after the robbery:

> And the defendants are not charged with being accessories after the fact. However, you must be careful to distinguish aiding and abetting and - - which is a theory of guilt of the crime charged from accessory after the fact, which is a separate and uncharged crime.
>
> The distinction or the difference between an aider and abettor and an accessory after the fact is that the aider and abettor is aware of and intends to further commission of the underlying offense prior to its completion. The underlying offense being the armed robbery. While the accessory after the fact does not decide to assist the perpetrator until - - in this case Mr. Zardus, until after the crime has ended, so as to help Mr. Zardus avoid discovery, arrest, trial, or punishment.

Glenn cites *People v Randolph*, 466 Mich 532, 543; 648 NW2d 164 (2002), in support of his position that the instructions could have improperly allowed the jury to find him guilty as an aider and abettor where he only assisted Zardus in reaching a place of temporary safety. He contends that the robbery was complete after the taking was complete, and thus, any latter assistance could only lead to guilt as an accessory after the fact. However, the distinction discussed in *Randolph* (which discussed the unarmed robbery statute, MCL 750.530), and later in *People v Scruggs (After Remand)*, 256 Mich App 303, 305 n 2; 662 NW2d 849 (2003) (which applied *Randolph* to the armed robbery statute) was between the use of force to accomplish a taking and the use of force to leave the scene of the taking. *Randolph*, *supra* at 543-545; *Scruggs*

(After Remand), *supra* at 305 n 2.[5] Here, Zardus used force to accomplish the taking. The trial court also instructed the jury that, to find defendants guilty of robbery, it must find that Zardus took the property from the store clerk after using force to make her afraid of an injury. It did not present a specific instruction that would allow the jury to find defendants guilty even if they only helped Zardus reach a place of safety, nor did the prosecutor rely on such a theory. Under the circumstances, the distinction raised in *Randolph* and *Scruggs* is inapplicable.

As a whole, the instructions fairly addressed Glenn's concern that he not be convicted as an aider and abettor on the basis of assistance rendered only after the crime. Glenn has established no plain error concerning the aiding and abetting instructions.

V.

A.

Defendants next argue that there was constitutionally insufficient evidence for their convictions. This Court reviews a defendant's allegations of insufficiency of the evidence de novo. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001)

B.

In reviewing a challenge to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Each element of the offense, including criminal intent, may be proven by circumstantial evidence and reasonable inferences arising from the evidence. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). "Because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

To establish armed robbery, the prosecution must show: (1) an assault; (2) a felonious taking of property from the victim's presence or person; (3) while the defendant is armed with a dangerous weapon. MCL 750.529; *People v Turner*, 213 Mich App 558, 569; 540 NW2d 728 (1995).

[5] After *Randolph* was decided, the Legislature amended both robbery statutes to provide that force used after the initial larceny may nonetheless satisfy the statute. See *People v Morson*, 471 Mich 248, 265 n 2; 685 NW2d 203 (2004) (Corrigan, C.J., concurring). However, this case involves the version of MCL 750.529 in existence before the amendment became effective on July 1, 2004.

Here, the prosecutor presented evidence that Zardus entered the Pair-A-Dice Inn on March 29, 2004, placed a BB gun to the clerk's head, and threatened to kill her. He then took approximately $345. The prosecutor presented sufficient evidence to satisfy the elements of armed robbery. The prosecutor also presented sufficient evidence that defendants both knew that Zardus intended to rob the store, intended that he do so, and assisted him. Grahovac testified about statements defendants made to the police. Both Glenn and Worth told the police that Zardus had taken the BB gun from Wal-Mart with Glenn's help. Both men told the police that Zardus said that he wanted to rob a store. Both men told the police that Zardus identified Pair-A-Dice Inn as the store he intended to rob. Worth also told the police that Zardus asked the pair to go to the store and "check it out" for him. Worth stated that he told Zardus that he wanted some of the money and Zardus gave him $50. Both defendants admitted that they helped Zardus get rid of the gun and the phone receiver that Zardus ripped from the phone in the store.

Defendants helped Zardus steal the weapon used in the robbery, dropped Zardus off near the store, and then returned to retrieve him. Defendants maintained that they did not know that Zardus would actually commit the robbery. However, their admissions that Zardus told them that he intended to commit a robbery were sufficient to enable the jury to find that they knew the robbery would occur. The jury was free to reject the self-serving portion of defendants' statements to the police while believing the remainder. See *Wolfe, supra* at 514-515. When coupled with the other evidence produced at trial, these admissions provided sufficient evidence to support the convictions for aiding and abetting armed robbery.

The prosecutor also presented sufficient evidence to support defendants' conspiracy convictions. The elements of conspiracy are that defendant intended to combine with others and intended to accomplish an illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). The prosecution must prove that the parties "specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Proof of a conspiracy may be derived from the circumstances, acts, and conduct of the parties, and inferences are permissible. *Id*. at 347. The scope of the conspiracy may be determined by examining circumstantial evidence. However, any inferences that are drawn must be reasonable. *Id*. at 348.

Here, defendants' admissions also supported the conspiracy convictions. Our Supreme Court has held that "[w]hat the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do." *People v Hunter*, 466 Mich 1, 9; 643 NW2d 218 (2002). Here, the prosecutor presented evidence that defendants helped Zardus obtain a weapon for a robbery, took him to the place to be robbed, and helped him leave afterward. A reasonable inference can be made that defendants agreed to join with Zardus to commit the crime.

VI.

Next, Glenn argues that he is entitled to resentencing because the state and federal due process clauses prohibit scoring points under offense variable 13 for a juvenile adjudication. Glenn provides no analysis for why, constitutionally, scoring points for a juvenile adjudication would constitute a deprivation of due process. Glenn also cites no authority for this constitutional argument. "[D]efendant has announced a position, and left it to this Court to discover and rationalize the basis for the claim." *People v Harris*, 261 Mich App 44, 50; 680

NW2d 17 (2004) (internal quotation marks and citation omitted). Defendant has abandoned his due process argument regarding sentencing.

VII.

A.

Next, Worth argues that the trial court denied him a fair trial by various instructional errors, and by failing to grant his motions for directed verdict and for a new trial. Worth further argues that the trial court should not have allowed Glenn's statement to be used against him. While we agree that the trial court should not have allowed Glenn's statement to the police to be admitted as evidence against Worth, we find below that this error was harmless under the circumstances.

Defendant did not object to the jury instructions. While defendant contends that he objected to the introduction of Glenn's statement to the police, we find no such objection in the record. This issue is not preserved. MCL 768.29; *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003); *Fletcher*, *supra* at 558.

Unpreserved claims of improper jury instruction are reviewed on appeal for plain error, *Gonzalez*, *supra* at 642-643, as are unpreserved claims of evidentiary error, *Jones*, *supra* at 355. To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error must have occurred; (2) the error was plain; and (3) the plain error affected substantial rights, i.e., the defendant was prejudiced (the defendant generally must show that the error affected the outcome of the lower court proceedings). *Carines*, *supra* at 763. When reviewing a trial court's decision on a motion for a directed verdict, this Court examines de novo the evidence presented to the time of the motion in a light most favorable to the prosecutor, to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Warren (After Remand)*, *supra* at 588.

B.

1. Conspiracy Instructions

Defendant argues that the trial court provided inadequate instructions concerning the essential elements of conspiracy. Jury instructions are read as a whole, rather than extracted piecemeal to establish error. *Kurr*, *supra* at 327. Even if somewhat imperfect, jury instructions do not warrant reversal if they "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *Id*. The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence. *Id*.

As noted previously, the elements of conspiracy are that defendant intended to combine with others and intended to accomplish an illegal objective. *Mass*, *supra* at 629. In the instant case, the trial court provided the following instruction on conspiracy:

> The defendants are charged with the crime of conspiracy to commit armed robbery. Anyone who knowingly agrees with someone else to commit armed

> robbery is guilty of conspiracy. To prove the defendants' guilt, the prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the defendants and John Zardus knowingly agreed to commit an armed robbery. Second, that the defendants specifically intended to commit or helped commit the crime. Third, that the agreement took place or continued during the period from March 28th to March 29th, 2004.

This instruction accurately describes the essential elements of conspiracy: that defendants agreed to commit the robbery and the specific intent that the robbery be committed. In addition, as noted by the prosecutor, it mirrors the instruction found in CJI2d 10.1, which this Court has previously cited approvingly. *People v Barajas*, 198 Mich App 551, 553; 499 NW2d 396 (1993).

Defendant argues that the instruction was flawed because it did not specifically state that the jury had to find that the agreement to commit the crime preceded the crime. However, the victim testified that the robbery took place after 4:00 a.m. on March 29, 2004. The trial court's instruction, which stated that the prosecutor must prove that the agreement took place during the period from March 28, 2004, to March 29, 2004, adequately conveyed the requirement that the agreement take place before the crime was committed. Defendant has not shown plain error in the trial court's decision to provide this jury instruction.

2. Instruction on the Use of Codefendant's Glenn's Statement

The trial court instructed the jury that it could consider the out-of-court statements made by defendants in deciding whether defendants' trial testimony was truthful and in determining the facts of this case. Defendant argues that the trial court should have provided a limiting instruction to prevent the jury from considering codefendant Glenn's statement to the police against him.

The prosecutor concedes that codefendant Glenn's out-of-court statements were inadmissible against Worth under MRE 801(d)(2)(E)[6] because the statements were not made in furtherance of the conspiracy. The prosecutor further admits that the introduction of this evidence vis-à-vis defendant Worth was improper under *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004), because it was made by a nontestifying codefendant who was not subject to cross-examination.

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[6] MRE 801(d)(2)(E) provides, in relevant part:

> (d) A statement is not hearsay if–
>
> ***
>
> (1) The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy on independent proof of the conspiracy.

However, our Supreme Court has stated that an error of this type is subject to a harmless error analysis. *People v Shephard*, 472 Mich 343, 347; 697 NW2d 144 (2005). Thus, because this issue was not preserved, defendant is entitled to relief only if he can establish that the error was outcome determinative. *Carines*, *supra* at 763.

In the instant case, defendant cannot meet this burden because the information contained in Glenn's statement was cumulative of the information Worth gave to the police in his own, properly admissible, statement. As noted above, both defendants told the police that Zardus took the BB gun from Wal-Mart with Glenn's help. Both men told the police that Zardus said that he wanted to rob a store. Both men told the police that Zardus pointed out the Pair-A-Dice Inn as the store he intended to rob. Both defendants admitted that they helped Zardus get rid of the gun and the phone receiver.

In addition to these admissions, Worth told the police that Zardus asked the pair to go to the store and check it out for him and that he told Zardus that he wanted some of the money and Zardus gave him $50. Worth's statements were more incriminating than Glenn's. Under these circumstances, defendant Worth cannot show that he is entitled to relief due to the erroneous admission of Glenn's out-of-court statements against Worth or the lack of a jury instruction restricting this evidence to use against Glenn.

3. Refusal to Grant Defendant's Motion for a Directed Verdict

Defendant also argues that the trial court erred in refusing to grant his motion for a directed verdict on the conspiracy charge. As discussed above, the prosecutor presented sufficient evidence of the essential elements of the conspiracy charge to support the jury's guilty verdict. Therefore, this claim is without merit. *Warren (After Remand)*, *supra* at 588.

VIII.

A.

Next, defendants argue that they were deprived of their constitutional right to effective assistance of counsel.[7] Defendants failed to move for a new trial or an evidentiary hearing on the basis of ineffective assistance of counsel. Therefore, this Court's review is limited to mistakes apparent on the record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

B.

A constitutional claim of ineffective assistance of counsel is reviewed under the standard established in *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), which requires the defendant to show that, under an objective standard of reasonableness,

[7] The United States constitution provides: "In criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const, Am VI. Similarly, the Michigan constitution provides: "In every criminal prosecution, the accused shall have . . . assistance of counsel for his defense . . . ." Const 1963, art 1, § 20.

counsel made an error so serious that counsel was not functioning as an attorney guaranteed under the sixth amendment. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The right to counsel under the Michigan constitution does not impose a more restrictive standard than that established in *Strickland*. *People v Pickens*, 446 Mich 298, 318-319; 521 NW2d 797 (1994).

Effective assistance of counsel is presumed and defendants bear a heavy burden of proving otherwise. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To succeed on a claim of ineffective assistance of counsel, a defendant must show that, but for an error by counsel, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). A defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). A defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Garza, supra* at 255.

Worth presents a blanket claim that if this Court fails to consider any of the issues raised in this brief, or determines that appellate relief is not warranted because there was no objection by trial counsel, defendant is entitled to a new trial due to ineffective assistance of counsel. This claim is non-specific. It does not address any of the individual claims of errors in light of counsel's responsibilities or whether the outcome of defendant's trial would have been different had counsel objected.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. . . . Failure to brief a question on appeal is tantamount to abandoning it. [*People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).]

Worth does not address the strong presumption that counsel's actions were, or could have been, strategic, *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Henry*, 239 Mich App 140, 146; 607 N.W.2d 767 (1999), and therefore, Worth has abandoned this argument on appeal. *Id*.

Glenn also raises a general claim of ineffective assistance. For the same reasons, Glenn has abandoned much of his claim. The only specific argument Glenn asserts is that counsel acted unreasonably when he failed to object to the prosecutor's derogatory comments during closing argument. Glenn maintains that the failure to object to the comments about witness credibility or the derogatory statements is "much less susceptible to the argument that it should be considered sound trial strategy." *Hodge v Hurley*, 426 F3d 368, 386 (CA 6, 2005). Glenn also argues that, because the credibility of the "defense witnesses" was critical, the improper comments were highly prejudicial.

Because the prosecutor's arguments were not improper (see above), we reject defendant's claim.[8] Counsel is not ineffective for failing to make a futile objection. *Thomas, supra* at 457. In addition, any prejudice was cured by the trial court's jury instructions; ergo defendant has failed to show actual prejudice in support of his ineffective assistance claim. Because the prosecutor's statements were not gratuitously insulting, and the trial court's jury instructions were sufficient to cure any prejudice, defendant has failed to show that he is entitled to relief due to ineffective assistance.

IX.

In conclusion, we reject defendants' challenges. First, Glenn was not denied a fair trial due to the prosecution's failure to disclose a rejected plea offer made to a jailhouse informant before his testimony. Second, defendants are not entitled to a new trial due to prosecutorial misconduct. Third, the trial court did not erroneously instruct the jury on the distinction between aiding and abetting and accessory after the fact. Fourth, the prosecution presented sufficient evidence to support defendants' convictions. Fifth, Glenn has abandoned his due process claim regarding scoring of offense variable 13 at sentencing. Sixth, Worth has not shown that he is entitled to a new trial due to instructional error, and the trial court correctly denied his motion for a directed verdict. Finally, defendants have not shown that they were denied effective assistance of counsel.

Affirmed.

/s/ David H. Sawyer
/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto

[8] In addition, it is conceivable that defense counsel failed to object because he (strategically) thought the prosecutor's remarks would alienate the jury.